

FEDERAL CIRCUIT COURT OF AUSTRALIA

*MARAHAR v MINISTER FOR IMMIGRATION
& ANOR*

[2016] FCCA 1549

Catchwords:

MIGRATION – Application for judicial review – whether Applicant failed to meet PIC 4020 – bogus document in relation to IELTS test – application dismissed.

Legislation:

Migration Act 1958 (Cth), ss.31, 41, 65, 97, 338, 476, 359A, 359C 360, 360A, 362B, Pt.5

Migration Regulations 1994 (Cth), cls.885.224, pts.885, 886, 887, sch.2, 4, item 4020

Cases cited:

Trivedi v Minister for Immigration and Border Protection [2014] FCAFC 42

Sun v Minister for Immigration and Border Protection [2016] FCAFC 52

SZFDE v Minister for Immigration and Citizenship (2007) 232 CLR 189

Applicant:

GURSEWAK SINGH MARAHAR

First Respondent:

MINISTER FOR IMMIGRATION &
BORDER PROTECTION

Second Respondent:

ADMINISTRATIVE APPEALS
TRIBUNAL

File Number:

MLG 2658 of 2014

Judgment of:

Judge Jones

Hearing date:

19 April 2016

Date of Last Submission:

19 April 2016

Delivered at:

Melbourne

Delivered on:

24 June 2016

REPRESENTATION

Counsel for the Applicant: Self-represented

Counsel for the Respondents: Mr Hibbard

Solicitors for the Respondents: Clayton Utz Lawyers

ORDERS

- (1) The name of the Second Respondent be amended to the 'Administrative Appeals Tribunal'.
- (2) The Applicant's application for judicial review filed on 23 December 2014 be dismissed.
- (3) The Applicant pay the First Respondent's costs.
- (4)
- (5)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT MELBOURNE

MLG 2658 of 2014

GURSEWAK SINGH MARAHAR

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

Introduction

1. On 24 December 2014, the Applicant applied for a judicial review of a decision of the Second Respondent, the Tribunal, made on 18 November 2014, affirming a decision of a delegate of the Minister for Immigration and Border Protection (“the delegate”), not to grant the Applicant a Skilled (Residence) (Class VB) visa (“the visa”). The Applicant also sought judicial review of the delegate’s decision not to grant the visa made on 29 November 2013.
2. I propose, firstly, to dispense with the Applicant’s application for judicial review of the delegate’s decision not to grant the visa made on 29 November 2013.

3. The jurisdiction of this Court is set out in s.476 of the *Migration Act 1958* (“The Act”), which provides that the Court has original jurisdiction in all matters, subject to certain exceptions, one of those exceptions being what is defined as “*a primary decision*”. A primary decision is defined in sub-s.476(4) as a decision that is or can be reviewed pursuant to Pt.5 of the Act. The delegate’s decision was a decision that is or can be reviewed pursuant to Pt.5 of the Act, that is, an MRT reviewable decision, within the meaning of s.338 of the Act. Consequently, it falls within the exception to the jurisdiction of this Court. Accordingly, the Court has no jurisdiction to review the decision of the delegate, and that part of the Order sought by the Applicant is dismissed.

Background

4. Turning to the relevant background, the Applicant, a citizen of India, applied to the Department of Immigration and Citizenship (“the Department”), as it then was, for the visa on 23 June 2011. In his visa application, the Applicant stated that he had not undertaken an English language test within the preceding 24 months, but that his English language ability was competent (CB 12).
5. On 11 July 2013, the Applicant provided the Department with an International English Language Test System (IELTS) test report (CB 50).
6. On 31 October 2013, an officer of the Department sent a letter by email to the Applicant’s email address, and to the Applicant’s representative’s email address, in which the Applicant was invited to comment on adverse information (CB 84 to 89). The information was that the IELTS test report provided to the Department, was for an IELTS test undertaken by someone other than the Applicant.
7. On 26 November 2013, the Applicant’s representative sent an email to the Department, in which he stated he had been unable to contact the Applicant, and requested an extension of a further 28 days in which to respond to the Department’s request (CB 90 to 91). The Department refused the request for an extension in time (CB 92 to 94).

8. On 29 November 2013, the delegate refused to grant the visa on the basis that the Applicant did not satisfy the requirements of cl.885.224 of sch.2 to the *Migration Regulations 1994* (“the Regulations”) because he did not satisfy Public Interest Criterion (PIC) 4020 (CB 101 to 105).
9. On 19 December 2013, the Applicant applied to the Tribunal for a merits review of the delegate’s decision (CB 151 to 161). The Applicant nominated, as his authorised representative, a Mr Mohammad Aftab, from SOZ Migration Services (CB 157).
10. By letter dated 15 July 2014, the Tribunal invited the Applicant to appear before it at a hearing on 14 August 2014. The invitation to the Applicant was sent care of his migration agent, as nominated in his application for review (CB 173 to 180).
11. The Applicant did not attend the hearing (CB 181 to 184), and no response to the invitation was received by the Tribunal. After the scheduled hearing date, by letter dated 25 August 2014 sent to the Applicant care of his representative (CB 185 to 189), the Tribunal:
 - a) informed the Applicant that there was information that, it considers would, subject to any comments or response from the Applicant, be the reason, or part of the reason, for affirming the delegate’s decision. The information was the apparently bogus IELTS test report;
 - b) requested that the Applicant respond to, or comment on that information; and
 - c) invited the Applicant to provide information to justify the granting of the visa.
12. The Tribunal stated that any response should be received by 17 September 2014 (CB 189). No response was received by that date.
13. On 25 September 2014, the Applicant’s migration agent replied to the Tribunal’s letter by email (CB 190). In the email he stated as follows:

“I would like to advise you that We (sic) received mail regarding the invitation to comment about the MRT case 1318948.

I was not available in office due to family reason (sic) and got mail very late. I have informed my client about the requirement.

I would like to request you (sic) to give us a few more days time to submit the explanation. I was not available in office due to family reason (sic). ”

14. On 26 September 2014, a Tribunal officer informed the representative by email that (CB 191):
 - a) because the Applicant failed to respond by 17 September 2014, he had lost his right to a hearing; and
 - b) the Tribunal would provide a further two weeks in which the Applicant could provide further information or comments in support of his case.
15. The Tribunal did not receive further information from the Applicant or his representative.

Tribunal decision

16. On 18 November 2014, the Tribunal affirmed the delegate’s decision to refuse to grant a visa (CB 195 to 201). The Tribunal made the following findings:
 - a) the Applicant had provided a bogus document as described by PIC 4020(5) (CB 198 to 200 at [14] to [27]);
 - b) accordingly, the Applicant did not meet PIC 4020 (CB 200, at [28]);
 - c) there were no compelling circumstances within the meaning of PIC 4020(4), such as to satisfy the Tribunal that it should exercise its discretion to waive the requirements of PIC 4020(1) (CB 200, at [29] to [33]); and
 - d) accordingly, the Applicant did not satisfy PIC 4020(4)(a) or (b) and, therefore, did not meet the requirements of PIC 4020 (CB 200, at [34]).

Legislative Scheme

17. Section 31(3) of the Act provides that the Regulations may prescribe criteria for the grant of a visa. Section 41(1) of the Act provides that these visas may be subject to particular conditions. Section 65(1) of the Act provides that a visa may be granted only if the decision-maker is satisfied that the prescribed criteria for the visa have been satisfied. The Regulations then set out prescribed classes of visas as well as subclasses of visas. At the relevant time, the subclasses of the visa were set out in Pts.885, 886 and 887 of sch.2 to the Regulations.

18. The criteria set out in the subclass 885 visa are the relevant criteria for these proceedings. At the relevant time, cl.885.224 of sch.2 to the Regulations provided, relevantly, that the criteria to be satisfied are that the Applicant:

“(a) satisfies public interest criteria 4001, 4002, 4003, 4004, 4005, 4010, and 4020.”

19. At the relevant time, the PIC 4020, contained in sch.4 to the Regulations, provided as follows:

“(1) there is no evidence before the Minister that the applicant has given or caused to be given to the Minister, an officer, the Migration Review Tribunal, a relevant assessing authority, or a medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:

(a) the application for the visa; ...”

...

(4) The Minister may waive the requirements of any or all of the paragraphs (1)(a) or (b) and subclause (2) if satisfied that:

(a) compelling circumstances that affect the interests of Australia; or

(b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;

justify granting of the visa.”

20. Section 97 of the Act defines “*bogus document*” as follows:

“bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or*
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or*
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.”*

Judicial Review

21. As the Applicant was self-represented, I explained to him, through an interpreter in the Punjabi and English languages, the nature of judicial review proceedings. In particular, I explained that the function of the Court was not to consider the merits of his application, but whether the Tribunal decision gave rise to jurisdictional error or, as an alternative phrase, a serious legal mistake.

22. In his application for judicial review, which he filed on 24 December 2014, the Applicant specified the following grounds of review:

“(1) MRT decision is not acceptable;

(2) MRT decision was not taken in fairly manner;

(3) I am not happy the decision of MRT. In decision MRT didn't consider my exceptional circumstances I faced during my study.”

23. I asked the Applicant to explain each of those grounds to the Court. In relation to the first ground, he said that he was not aware that the IELTS test report was a bogus document. In relation to the second and third grounds, the Applicant's explanation made it clear that his complaint was about the fact that he was not given an opportunity to appear before the Tribunal, and to give evidence and make submissions. He said to the Court that he was told by his migration agent that the agent had sent comments and responses to the Tribunal, in response to the Tribunal's request. He said he did not ask for a copy of those responses or comments.

Grounds of review

24. As the Minister correctly submits, the Applicant is not required to knowingly be aware of the fact that the bogus document was bogus, and the Minister refers to the Full Court decision of *Trivedi v Minister for Immigration and Border Protection* [2014] FCAFC 42, and in particular paragraphs [49] and [50] of the decision of Buchanan J, with whom Allsop CJ and Rangiah J concurred. At paragraphs 49 to 50, Buchanan J stated –

“[49] For the reasons I have already given, it should be accepted that PIC 4020 is directed to information or documents which are purposely untrue. It seems to me to be clear from the same analysis that the purpose of PIC 4020 was to render visa applicants ultimately responsible for the veracity of the information and documents supplied to support the application. Although the limited terms of the waiver (and therefore any discretion to excuse non-compliance) make it apparent that innocent errors are not the focus of attention, it is equally clear that PIC 4020 is directed at the overall integrity of the visa system and as a bulwark against deception and fraud from any quarter associated with a visa applicant. It is not inconsistent with a coherent public policy to make a visa applicant ultimately responsible for purposely untrue material provided with a visa application. It would be an intolerable burden on the administration of the visa system to require that those assessing visa applications not only discover that information or documents are false in a material particular, but also that the visa applicant who provided them knew them to be so. In many cases that would be impossible and would defeat the apparent intent of the provision.

[50] There was no doubt in the present case (and in Vyas) that the IELTS test result form provided by the first appellant contained false information. It was clearly open to the MRT, on the other facts found by it, to conclude that it was bogus. It was a counterfeit. It was not the real thing. The fact that a formal declaration to that effect was not made in the present case does not alter the character of the document, or the information it contained. It was also open to the MRT to find, as it did, that the information thereby given by the first appellant was false or misleading in a material particular. It was not necessary to prove that the first appellant knew the contents of the document were false or misleading when she proffered it.”

25. It is also appropriate to refer to a recent decision of the Full Court, a copy of which was provided to the Court by the Minister, in *Sun v Minister for Immigration and Border Protection* (2016) FCAFC 52. In this decision, the Full Court was required to consider, in relation to compliance with PIC 4020, issues including onus of proof, reasonable suspicion and the knowledge required by the Applicant of the bogus document, or false and misleading information.
26. Their Honours considered the statutory scheme, including the definition of a bogus document and the content of PIC 4020. Flick and Rangiah JJ stated at paragraphs [33] to [34]:

“33. The application of these provisions had the consequence that the Minister (and the Tribunal standing in the shoes of the Minister) was to grant the visa if “satisfied” (s 65(a)) that the applicant “satisfie[d] public interest criteria ... 4020” (cl 892.223). And to satisfy that criterion there had to be “no evidence” that an applicant had given to the Minister a “bogus document...”. A “bogus document” was one that the Tribunal “reasonably suspect[ed]” fell within the definition in s 97. That phrase, accordingly, did not necessarily bear its normal meaning but rather the meaning as statutorily defined.

34. In unravelling these provisions, it is relevantly necessary to give content to the statutorily imposed requirements that a decision-maker:

- be “satisfied” that the criteria had been satisfied; and*
- has before him “no evidence” that a “bogus document” had been given to the Minister.*

It is, of course, the particular statutory context in which these requirements are imposed that primarily dictates the content of each requirement. Central to the present statutory context are these two concepts of the Minister or the Tribunal being “satisfied” and that of a “bogus document”.”

27. Their Honours considered the question of the onus of proof on a Tribunal, and, having considered in some detail the authorities in relation to this question, said at [79]:

“There remains, accordingly, neither a statutory source of any onus to be imposed upon the Tribunal in the present case; nor is there any sound reason of general principle to import into

decision-making by the Tribunal the common law concept of onus.”

28. Having dispensed with the question of onus on the Tribunal, their Honours then turned to consider the question of reasonable suspicion, in terms of the state of satisfaction that a Tribunal must reach, in deciding that there was no evidence that the Applicant had provided a bogus document. Their Honours stated as follows at [83]:

“...If there was no lawful basis upon which the Tribunal could “reasonably suspect” that the documents were “bogus documents”, the Tribunal could not lawfully reach a state of “satisfaction” for the purposes of s 65 of the Migration Act. Without trespassing into the fact-finding responsibility entrusted by the Legislature to the Migration Review Tribunal alone, it remained open to the Court to examine the factual foundation upon which the Tribunal concluded that it “reasonably suspected” the documents were “bogus documents”.”

29. The question then becomes, of course, whether there was an objective basis for the Tribunal in this matter to reasonably suspect that the IELTS test report provided by the Applicant was a bogus document. The Tribunal set out the basis upon which it reached its finding in the decision record at [19] to [22] (CB 199):

“19. Together with the visa application, the applicant provided a Test Report Form according to which he had undertaken an IELTS test on 15 June 2013 and he had achieved scores of 6.0 in listening, 6.5 in reading and writing, and 7.5 in speaking.

20. The applicant provided to the delegate a Test Report Form number (TRF number) in relation to the test which he said he undertook: 13IN028403MARG855A.

21. According to the delegate’s decision, on 17 October 2013 the Department conducted an online check to verify the test results using the test reference number provided by the applicant. While the test scores matched, the delegate was of the view that the photograph which appeared on the Test Report Form was different from the photograph which appeared online. According to the delegate the online IELTS photograph also did not match the passport photo of the applicant provided on the visa application.

22. According to the delegate's decision, on 31 October 2013 the Audit and Investigations Manager of IDP Education emailed the delegate to state that after careful consideration and review of their internal records, they concluded that the Test Report Form submitted by the applicant did not match IDP Education's records."

30. I note here that the Applicant was given an opportunity to provide information and to comment on this information, both to the delegate and to the Tribunal, and did not.

31. The Tribunal concluded (CB 200 at [26]):

"On the information before it, the Tribunal is satisfied that it was not he but another person who attended the IELTS test on 15 June 2013. The Tribunal is satisfied that the applicant himself, or someone else at his request, altered the IELTS test and then provided to the Department what he knew to be 'a bogus document' with a substituted photograph (s.97(b) of the Act)."

32. The Tribunal found at [27] (CB 200) that the Applicant had provided a bogus document to the Department. The Tribunal, accordingly, found the Applicant did not meet PIC 4020(1). It then went on to consider whether the requirement of PIC 4020(1) should be waived, and said that, in the circumstances, there was no material before the Department or the Tribunal, to satisfy the Tribunal that there were compelling circumstances in the terms required by PIC 4020(1) or (2) that would justify waiving the requirement.

33. I am satisfied that the Tribunal had an objective basis on which to form a reasonable suspicion that the document, the IELTS test report, was a bogus document.

34. The Applicant's submission that his migration agent had told him that he had sent comments to the Tribunal does not, in my opinion, constitute jurisdictional error. The Applicant is not alleging fraud, but, rather, stating that he was misguided by the agent. The authorities establish that negligent conduct by an agent does not constitute jurisdictional error: *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189.

35. Furthermore, there is nothing unfair or unreasonable in the manner in which the Tribunal proceeded to determine the application for review.

The Tribunal invited the Applicant to attend a hearing to give evidence and make submissions pursuant to s.360 of the Act. Its invitation complied with s.360A of the Act.

36. The Applicant did not respond to the hearing invitation and did not attend the hearing. Pursuant to s.362B of the Act, the Tribunal was entitled to proceed to determine the application for review. After the hearing, the Tribunal invited the Applicant to comment on or respond to adverse information in accordance with s.359A of the Act (see [10]-[11] above). No response was received. As the Tribunal stated, it was entitled, pursuant to s.359C of the Act, to make a decision without further action. Despite this, the Tribunal, again, invited the Applicant, through his agent, to provide further information, which the Applicant failed to take advantage of (see [13] - [15] above).

Conclusion

37. For the reasons set out above, I am not satisfied that the grounds relied on by the Applicant give rise to jurisdictional error. Consequently, I will dismiss the Applicant's application for judicial review, with costs.

I certify that the preceding thirty-seven (37) paragraphs are a true copy of the reasons for judgment of Judge Jones

Date: 24 June 2016